**Baumgartner Masonry, LLC *and* Bricklayers & Allied Craftworkers District Council of Wisconsin, AFL–CIO.** Case 30–CA–14633

September 2, 1999

## DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

Upon a charge filed by the Union on February 25, 1999, the General Counsel of the National Labor Relations Board issued a complaint on April 30, 1999, against Baumgartner Masonry, LLC, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. On May 12, 1999, the Respondent filed an answer to the complaint. By letter dated July 8, 1999, however, the Respondent notified the Region that it was withdrawing its answer to the complaint.

On July 19, 1999, the General Counsel filed a Motion for Summary Judgment with the Board. On July 21, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

### Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.

By letter to the Region of July 8, 1999, the Respondent withdrew its answer to the complaint, with no further explanation. Such a withdrawal of an answer has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be true.[1]

Accordingly, in light of the withdrawal of the Respondent's answer to the complaint, and in the absence of good cause being shown otherwise, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Kaukauna, Wisconsin, has been engaged in the business of masonry contracting. During the past calendar year ending December 31, 1998, a representative period, the Respondent, in conducting its operations, purchased and received products, goods, and materials at its facility valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent, as more particularly described in article III, section 3.1 of the collective-bargaining agreement, the unit, constitute a unit appropriate for purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All employees in the classifications of work falling within the jurisdiction of the union as defined in this agreement.

On August 19, 1998, the Respondent, an employer engaged in the building and construction industry granted recognition to the Union as the exclusive collective-bargaining representative of the unit without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act. Such recognition has been embodied in a collective-bargaining agreement, to which the Respondent became a signatory on August 19, 1998, which is effective for the period June 1, 1998, to May 31, 2002.

Since August 19, 1998, the Union has been the designated collective-bargaining representative of the unit and since that time the Union has been recognized as the representative by the Respondent.

On September 30, 1998, the Respondent informed the Union that it was no longer a union contractor and thereby withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit. Since September 30, 1998, the Respondent has failed and refused to continue in full force and effect all the terms and conditions of the collective-bargaining agreement, including, but not limited to, the following: failing to pay its unit employees the wages provided in the collective-bargaining agreement; failing to remit payments to benefit funds provided in the collective-bargaining agreement; and failing to process grievances as provided in the collective-bargaining agreement. These terms and conditions are mandatory subjects of bargaining.

[1] See *Maislin Transport*, 274 NLRB 529 (1985).

## CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has failed and refused to abide by the terms of the 1998–2002 collective-bargaining agreement, by failing and refusing to pay its unit employees the wages as provided by the collective-bargaining agreement, by failing and refusing to remit payments to the benefits funds as provided by the collective-bargaining agreement and by failing to process grievance as provided by the collective-bargaining agreement. By this conduct, the Respondent has failed and refused to bargain collectively and in good faith with the Union as the limited exclusive bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

## THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) by failing to pay unit employees contractual wages rates, we shall order the Respondent to make the unit employees whole for any loss of earnings attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, having found that the Respondent has violated Section 8(a)(5) and (1) by failing to make contractually required contributions to the benefits funds as provided in the collective-bargaining agreement, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

Further, having found that the Respondent violated Section 8(a)(5) and (1) by failing to process grievances as provided in the collective-bargaining agreement, we shall order the Respondent to process grievances as required by the 1998–2002 collective-bargaining agreement.

## ORDER

The National Labor Relations Board orders that the Respondent, Baumgartner Masonry, LLC, Kaukauna, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to continue in full force and effect all the terms and conditions of the 1998–2002 collective-bargaining agreement with the Union.

(b) Failing and refusing, since September 30, 1998, to pay unit employees contractual wages rates as provided in the 1998–2002 collective-bargaining agreement.

(c) Failing and refusing, since September 30, 1998, to make contractually required contributions to the benefits funds provided in the 1998–2002 collective-bargaining agreement.

(d) Failing and refusing, since September 30, 1998, to process grievances as provided in the 1998–2002 collective-bargaining agreement.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Give full force and effect to the terms and conditions of its 1998–2002 collective-bargaining agreement with the Union.

(b) Make the unit employees whole for any loss of earnings attributable to its unlawful conduct, as set forth in the remedy section of this decision.

(c) Make the contractually required contributions to the benefit funds, as set forth in the remedy section of this decision.

(d) Make whole its unit employees for any loss of benefits or expense ensuing from its failure to make the benefit fund contributions from September 30, 1998, as set forth in the remedy section of this decision.

(e) Process grievances as required by the 1998–2002 collective-bargaining agreement.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Kaukauna, Wisconsin, copies of the attached notice marked "Appendix."[3] Copies of the notice,

[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 1998.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 2, 1999

John C. Truesdale, Chairman

Peter J. Hurtgen, Member

J. Robert Brame III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to continue in full force and effect all the terms and conditions of our 1998–2002 collective-bargaining agreement with the Union.

WE WILL NOT fail and refuse to pay our unit employees contractual wages rates as provided in the 1998–2002 collective-bargaining agreement.

WE WILL NOT fail and refuse to make contractually required contributions to the benefits funds provided in the 1998–2002 collective-bargaining agreement.

WE WILL NOT fail and refuse to process grievances as provided in the 1998–2002 collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL continue in full force and effect all the terms and conditions of our 1998–2002 collective-bargaining agreement with the Union.

WE WILL make our unit employees whole for any loss of earnings attributable to our unlawful conduct.

WE WILL make the contractually required contributions to the benefit funds.

WE WILL make whole our unit employees for any loss of benefits or expense ensuing from failure to make the benefit fund contributions.

WE WILL process grievances as required by the 1998–2002 collective-bargaining agreement.

BAUMGARTNER MASONRY, LLC